United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1299

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1299

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

DANIEL STALEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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2

TABLE OF CONTENTS

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Preliminary Statement

Daniel Staley appeals from a judgment after trial by jury in the United States District Court for the Eastern District of New York (Judd, *J.*) convicting him on October 4, 1974, on all seven counts of an indictment, charging him: in three counts with aiding and abetting the armed bank robbery of three different banks (18 U.S.C. §§ 2113(d) and 2); in three counts with the possession of bank robbery proceeds (18 U.S.C. § 2113(c)) and in one count with the conspiracy to commit armed bank robberies (18 U.S.C. § 371). On the counts charging violations of Title 18 U.S.C. §§ 2113(d) and 2, appellant was sentenced to an eleven year concurrent term of imprisonment. On the counts charging violations under Title 18 U.S.C. § 2113(c) appellant was sentenced to a 10 year term of imprisonment to run concurrent with each other and with

the bank robbery count. On the conspiracy count appellant was sentenced to a 5 year term of imprisonment concurrent with all other counts. His sentence on each was imposed pursuant to Title 18, U.S.C. § 4208(a)(1) with eligibility for parole after 2½ years.

Appellant is presently incarcerated on this sentence.

On October 4, 1974, appellant brought a motion for a new trial based upon newly discovered evidence, i.e., the affidavit and testimony of a new defense witness, Leroy Jones. After a full hearing on that date, the United States District Court denied appellant's motion for a new trial.

On appeal, appellant urges as error the improper conduct of the government in asking certain questions of one government witness and one defense witness and in making improper statements in summation which it is claimed were all made solely to prove the criminal character of the appellant. Daniel Staley also seeks to overrule the order of the United States District Court on October 14, 1974 denying his motion for a new trial based upon newly discovered evidence.

Statement of Facts

Trial

A. Government's Case.

On December 12, 1973, the National Bank of North America, at 152-80 Rockaway Blvd., Jamaica, New York was robbed of $17,038.00 (T. 423-426).* On December

* Numerals preceded by a "T" indicate a page reference to the transcript of the trial occurring on July 18, 22, 23, 24 and 25, 1974. Numerals preceded by an "H" refer to a page in the transcript of the hearing on the motion for a new trial on October 4, 1974.

18, 1974, the Reliance Federal Savings and Loan Association at 233-15 Hillside Avenue, Queens, New York was robbed of $7,979.00 (T. 292-294). On January 3, 1974, the Bayside Federal Savings and Loan Association at 257-25 Union Turnpike, Queens, New York was robbed of $12,334.00 (T. 297-298). All three banks were federally insured at the time of the robberies (T. 424, 293, 298). At trial, the government's witnesses, Jimmy Fennell,* Larry Derrick** and Larry Coates*** testified in great detail as to their participation in two or more of these robberies and as to the activities of Daniel Staley in planning, instructing and profiting in these robberies.****

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* Jimmy Fennell entered a plea of guilty on April 10, 1974 to Count 1 of Indictment 74 Cr. 96 which charged him with a violation under Title 18 U.S.C. § 2113(a). He was sentenced on September 9, 1974 to a term of imprisonment for five years under Title 18 U.S.C. § 4208(a)(1) with eligibility for parole after one year.

** Larry Derrick entered a plea of guilty on May 24, 1974 to Count 1 of Indictment 74 Cr. 34 which charged him with a violation under Title 18 U.S.C. § 2113(a). He was sentenced on December 13, 1974 to a term of imprisonment of six years recommended to run concurrently with his state charges.

*** Larry Coates entered a plea of guilty on May 21, 1974 to Count 1 of Indictment 74 Cr. 34 which charged him with a violation under Title 18 U.S.C. § 2113(a). He was sentenced on December 12, 1974 for a study and report under Title 18 U.S.C. § 4252. He was later sentenced on January 27, 1975 by Judge Judd for drug treatment under Title 18 U.S.C. § 4253. When it was later discovered that Coates did not meet the requirements for this program due to a pending state sentence, he was resentenced on April 4, 1975 to a five year term of imprisonment under Title 18 U.S.C. § 4208(a)(2) recommended to run concurrently with state charges.

**** In an attempt to present all the testimony as accurately as possible, inconsistent statements of government witnesses have been indicated in footnote references.

1. The National Bank of North America (December 12, 1973).

Larry Coates and Larry Derrick testified as to the robbery of the National Bank of North America on Rockaway Boulevard, Queens, New York on December 12, 1973 with another co-defendant, Fritz Emanuel Bastian (T. 165, 262).* At about three or four days prior to that robbery, Coates met with the appellant in his grocery store, at 106-56 150th Street, Jamaica, New York (T. 262, 320, 323, 507). Staley asked Coates (an addict)** if he had ever robbed a bank (T. 262, 318-319). When Coates answered in the negative, Staley asked "Well if I set up one for you are you willing to try?" (T. 262-263), adding that he had "checked it [the bank] out" and had an account there (T. 263, 323). Thereafter, Coates went to Derrick to ask him if he wanted to join them in a robbery, to which Derrick eventually responded in the affirmative (T. 165-166). On the morning of the robbery, Coates and his friend Bastian first met with appellant at his store. Staley told them that he was first going to take Coates and Bastian to the bank to "check it out" (T. 263-264). Appellant drove them in his car, to the bank where Coates and Bastian exited while appellant remained in the car (T. 265-266, 336-339).*** Bastian looked through the

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* Fritz Emanuel Bastian was convicted after a trial by jury before Judge Thomas C. Platt on Indictment 74 Cr. 34 charging him with two counts of bank robbery under Title 18 U.S.C. § 2113 (a) and § 2113(d). He was sentenced on to a term of imprisonment of twelve years under Title 18 U.S.C. § 4208(a)(2). Bastian's appeal was affirmed by this Court without opinion.

** Coates admitted to being a heroin addict during the commission of the three robberies (T. 263, 318-319, 345, 362, 394, 399-401). He further stated however that he had no difficulty in understanding appellant's instructions (T. 399-401).

*** On redirect Coates stated that on the morning of December 12, 1973, just he and appellant cased the bank, then he and Bastian cased it again immediately before entering the bank to rob it (T. 404-406).

glass window of the bank and Coates went inside. He then exited the bank, returned with Bastian to Staley's car, stating that the bank was just as Staley had described it (T. 266). On the way back from the bank, when Coates told Staley that they would need guns, Staley told them that he would take care of that (T. 266).

At the store Derrick joined Coates, Bastian and Staley. Staley showed the three men a diagram of the layout of bank on a piece of paper (T. 167, 323) and issued instructions to them. Bastian was to enter the bank first, followed by Derrick and Coates (T. 168). Bastian was to go behind a glass partition, subdue the manager, get the guard's gun and hand the tellers paper bags in which they were to place their money (T. 168, 196, 265). Coates was to watch the exit door (T. 265) while Derrick was to watch the people in the outer portion of the banking area and get the money from the tellers (T. 168, 194, 196, 265). Staley also told Coates that the "alarm system or lights" were out but to be cautious in handling any money in the teller's drawers because of an automatic alarm that could be triggered by removing the money in the back (T. 264-265). During this time a man identified as "Mitch" arrived at the store (T. 169, 267). Appellant told "Mitch" that he was to be the driver for the robbery and that he should wait in the car at the back of the bank's parking lot with the car doors open and the motor running (T. 169-170, 267).* Just prior to leaving for the bank, Staley handed two loaded .38 caliber handguns and one loaded .32 caliber handgun to Coates, Derrick and Bastian for use in the robbery (T. 170, 267-268, 333).

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* Arthur Mitchell also known as "Mitch" entered a plea of guilty on October 11, 1974 to Count 3 of Indictment 74 Cr. 448 charging him with a violation of Title 18 U.S.C. § 2113(c). He was sentenced on December 13, 1974 by Judge Platt to a three year term of imprisonment under Title 18 U.S.C. § 4208(a)(2) for his participation in this bank robbery.

Coates, Bastian and Derrick went to the bank with "Mitch" driving (T. 170, 268, 330). As they approached the bank, they passed by it because they observed an armored car parked in front (T. 171, 268, 330). After this truck left, however, "Mitch" parked the car, Coates, Bastian and Derrick exited it and waited outside as Bastian walked into the bank (T. 268). Bastian gained access to the officer's glass partitioned area by means of a ruse. He quickly subdued the manager and distributed to the tellers brown paper bags, previously taken from Staley's store (T. 171-172, 209, 268-269, 332, 340-341). A guard appeared and Bastian subdued and disarmed him (T. 171, 208, 269). By this time Coates and Derrick had entered the bank and were located outside of the partitioned area (T. 171, 210, 268). Derrick jumped over the glass and took one of the bags filled by a teller (T. 172, 269). All three exited the bank, returned to "Mitch's" car and proceeded to appellant's store (T. 172, 205, 269, 341). Here they met Staley and the proceeds of the robbery were shared by Derrick, Coates, Bastian, "Mitch" and Staley.* Coates, Derrick and Bastian thereafter returned the guns to Staley (T. 172) and his employee "Sonny" (James Anderson [T. 514]) (T. 270).

2. The Reliance Federal Savings and Loan Association, December 18, 1973

Larry Coates and Jimmy Fennell testified as to their participation in the robbery of the Reliance Federal Sav-

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* There appeared to be some confusion as to how the money was divided. Derrick testified that the mon as split three ways among himself, Bastian and Coates with an unknown amount given by each to Staley, out of which Staley paid the driver "Mitch" $500.00 (T. 172-174). Coates testified that they divided the proceeds four ways (equal shares to the three active robbers and the driver) after which each of the four handed appellant $500.00 (Tr. 269-270, 343-344).

ings and Loan Association on December 18, 1973 along with appellant and Horace Peterson, a drug addict (T. 33-59, 270-276, 464).*

Shortly after the first robbery, appellant met Coates at his store and informed him that he had another robbery for them to do (T. 271, 352). Within that week, Staley also met with Jimmy Fennell at a girlfriend's apartment at 145-40 South Road, Jamaica, four blocks away from Staley's store (T. 34-35, 110-111). Staley told Fennell to participate in a bank robbery to get money for Christmas (T. 35). At first Fennell refused. Staley met him the following day however, and told Fennell that he knew a bank to hit because he had "checked it out" and because his brother had an account there (T. 35-36). Appellant told Fennell that he had the robbery all planned and had the "right people" to help him, i.e., Coates and Derrick (who was originally scheduled to participate in this robbery) (T. 36-37). Fennell then agreed to go along (T. 36).

About two days before the robbery Fennell again met with appellant. Staley stated that he had a pistol for the robbery and gave Fennell the description of the bank. Appellant informed him that since the bank had many windows, Fennell and the others should make sure no one puts his hand in the air for outsiders to observe. Furthermore, there were hidden cameras and a door next to the vault that led to an unknown location (T. 39-40). In

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* Horace Peterson entered a plea of guilty on May 20, 1974 to Count 1 of Indictment 74 Cr. 96 charging him with a violation under Title 18 U.S.C. § 2113(a) stemming from his participation in this robbery. He testified on behalf of Daniel Staley at this trial (T. 456-501). He was sentenced on September 20, 1974 to a nine and one-half years term of imprisonment recommended to run concurrently with his state sentence. In accord with the district courts recommendation the Bureau of Prisons has designated Peterson's state institution as the place of Federal incarceration.

addition, Coates and Peterson were each handed a loaded handgun by Staley (T. 127, 357, 360).* Fennell examined the loaded .38 caliber handgun, then handed it back to Staley claiming that his role of jumping the counter to collect money did not require a gun (T. 127). Staley handed this extra gun to Coates who held it until they were on their way to the bank, at which time Coates gave it to Fennell (T. 126-128).

After they received the gun, Fennell, Coates and Peterson entered a blue car with an unknown driver (Tr. 50, 274, 254, 355).** As they approached the bank, they drove past the bank to see if it was as it had been described to them (T. 51, 274). When the driver parked half a block from the bank, Fennell, Coates and Peterson left the car and entered the bank (T. 51). Coates first went to the manager ostensibly to discuss opening an account at which time he announced the hold up and placed his gun in the manager's ribs (T. 52, 274). Fennell jumped over the teller's counter and placed the money in a white pillowcase that had been given to him by Staley earlier in the store (T. 46, 52-53, 274, 356, 358). Peterson watched the back door in the event that a previously observed guard would reenter the bank through that door (T. 52-53, 274). They each then exited the bank and returned to Staley's store in the same blue car (T. 53, 131, 275, 358).

In the back room of the store with Staley present *** they counted and divided the money (T. 54-56, 275-276).

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* Coates testified that "Sonny" and "Danny" (appellant) had the guns already in the store and they were handed over without any conversation (T. 272-273).

** The driver was identified as appellant's brother John Staley. John Staley was tried on Indictment 74 Cr. 447 before Judge Judd and acquitted on September 11, 1974.

*** Coates testified that Staley was in the back room as they returned from the robbery (T. 275), while Fennell testified that Staley came into the back room as they were almost finished counting the money (T. 56).

Fennell, Peterson and Coates divided the money three ways (T. 55, 360). Staley then asked for his share of this money informing them that he had "to take care of" the driver (T. 56). Coates and Peterson gave Staley $500 each while Fennell gave him $150 (T. 56-57, 275-276, 362-364).* After the money was divided, Fennell returned his gun to "Danny" who told "Sonny" to store it in the same location from which he had taken it (T. 58, 136-137).** Coates and Peterson also returned their guns (T. 276). On the night of this robbery, Staley returned to Fennell for the purpose of expressing his dissatisfaction for the amount of money given by Fennell. Fennell refused to give him any more (T. 59).

3. The Bayside Federal Savings and Loan Association (January 3, 1974)

Jimmy Fennell, Larry Derrick and Larry Coates each testified as to appellant's planning and their participation in the robbery at the Bayside Federal Savings and Loan Association on January 3, 1974 (T. 60-80, 175-181, 277-286).***

Around Christmas, 1973, Daniel Staley told Fennell that "the fellows are broke and they want to do something else and I got another job for them . . ." (T. 60, 141). Two days before the robbery, appellant told Coates that

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* Coates testified that Fennell also gave Staley $500 and they came up with an extra $500 for Staley to give to the driver for a total of $2000 given to Staley (T. 276, 362-364).

** In an unsolicited statement, Fennell stated that he left Staley immediately after he had given away the gun, because Staley's brother [Randolph Staley] had told him that the bank participants were to be robbed themselves (T. 57). The Court promptly excluded this statement (T. 57).

*** Although Derrick did not know of the exact date or location of the bank robbery, he did testify as to a robbery near Belmont Racetrack on Union Turnpike (T. 175, 255).

he had another robbery planned, mentioning a bank to which he had previously taken Coates when he had made a withdrawal (T. 277). Once again on the morning of the robbery, all three robbers met with appellant.

Prior to leaving for the robbery, Staley again supplied Coates, Fennell and Derrick with loaded weapons (T. 78, 154, 177-178, 283, 383-386). When they proceeded toward the bank, Fennell and Coates drove with Staley who led the way in his own green Ford LTD (T. 71, 145, 230-232), while Derrick drove with the New Jersey driver and the "kid" drove alone in the stolen, gold car (T. 72, 178, 379).* As they approached the bank, Fennell, Coates and Derrick all exited their cars and entered the gold stolen vehicle (T. 72, 146, 178, 231, 284), while appellant waited about a half mile from the bank in his car (T. 382). Coates and Derrick entered the bank and Fennell waited outside for a short time to observe a woman at the corner who had pulled a fire alarm (T. 72). He then entered and guarded the floor area of the bank (T. 147, 177). Derrick subdued the guard (T. 73, 179, 233, 284, 383), while Coates jumped over the counter to the tellers area (T. 73-74, 148, 179, 284, 384) and handed to them either a pillowcase or a brown paper bag in which to place their money (T. 148, 179, 284, 384).**

After Coates received the money, they all left the bank, returned to the stolen vehicle and drove until they reached

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* Coates was not sure but believed that all three drove with Staley in his car on the way to the bank (T. 379). Derrick at first testified that he drove alone with this driver (T. 178), but later testified that Coates might have been with them (T. 230).

** Fennell testified that Coates placed the money in a pillowcase that appellant had given to him earlier at the store (T. 148). Derrick testified that either Fennell or Coates gave the tellers a brown paper bag (T. 179, 234). Coates stated that he did not know if the money was in a pillowcase or a brown paper bag (T. 384).

an entrance on the highway where Staley was waiting. Here all three robbers entered his vehicle while the driver of the getaway vehicle entered the third car (T. 74, 180, 236-237, 284, 384).* This time, the appellant, three robbers and two drivers, all proceeded to an apartment utilized by Staley across the street from his grocery store (T. 75, 285, 385).** Here, the money was counted and divided three ways (T. 75, 180), with each of the drivers receiving $500 each. Derrick and Coates gave Staley $500 while Fennell gave him $150 (T. 76, 153, 181, 239, 286, 390-391).*** Once again, all the guns were returned to appellant (T. 77-78, 181, 392).

4. The unindicted bank robbery

Larry Derrick also testified as to another bank robbery planned by Staley occurring in January, 1974, near Kennedy Airport **** with Bastian and two others known as "Roy" (Leroy Jones) and "Eggie" (Thedrow Jones) (T. 183-187). As with the other robberies, appellant met with the participants before the robbery and gave them a diagram of the bank and particular instructions. Bastian was to reach over the counter to get the money, "Eggie" was to stand in the doorway and "Roy" was to stay in the stolen getaway car with the motor running (T. 183-184). "Eggie", Bastian and Derrick each received a gun from

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* Derrick testified that the driver of the stolen vehicle also entered Staley's car (T. 236).

** Derrick testified that on this occasion they returned to the store (T. 236).

*** Derrick testified that he gave Staley a "pack" of money containing an unknown amount (T. 239), while Coates stated that they each gave Staley $500 and some singles (T. 286, 390-391).

**** This robbery was not charged in the indictment but allowed as a subsequent similar act (T. 505). The robbery occurred on January 8, 1974 at the National Bank of North America, 151-16 84th Street, Queens, N. Y.

appellant (T. 184-185). These three went to the bank where Bastian took the money from the tellers (T. 185). After the robbery, they entered a stolen vehicle, drove two blocks and then got into appellant's car (T. 185-186). From there they returned to appellant's store, divided the money equally four ways (between Bastian, Derrick, "Eggie" and "Roy"). Staley received an unknown amount of money from Derrick on this occasion as well and all the guns were returned to him (T. 186-187).

The remainder of the government's direct case depended upon the testimony of bank employees and bank documents.

Mr. Leonard Silverman, an Assistant Manager of the National Bank of North America on Rockaway Boulevard identified appellant as a steady customer at his bank for a year preceding the day of the robbery (T. 430). Admitted into evidence was savings account cards and ledger sheets under the name of Christine and Daniel Staley opened on June 1, 1970 (Government Exhibit 7, 8). The ledger cards attached to that account evidenced a final transaction on the date of the first robbery, December 12, 1973 which left a remaining balance in the account of $2.90 (T. 427-429; Government Exhibit 9 and 10). Bank records at the Reliance Federal Savings and Loan on Hillside Avenue indicated an account in the name of Virginia and Randolph Staley, appellant's brother (Government's Exhibit 2, T. 294, 448-449). Records at the third bank, the Bayside Federal Savings and Loan Association, on Union Turnpike, evidenced an account in the name of Randolph Staley and a savings account in the name of Daniel Staley (Government's Exhibit 4, 5, (T. 299-301).

B. The Defense

The appellant called Horace Peterson. On direct, Peterson admitted to robbing the Reliance Federal Savings and Loan Association on December 18, 1973, with Coates and Fennell (T. 456-458). He claimed appellant had nothing to do with the robbery and as far as he knew, it was not planned by anyone (T. 458, 461). Coates merely met him the day before (in the absence of appellant) and told him they were going to rob a bank without detailing any plans (T. 458-459). Coates gave him a gun and after they robbed the bank they returned to Staley store. Staley, however was not present (T. 459). The money was divided three ways and appellant never received a share of the proceeds (T. 460).

On cross-examination, Peterson denied ever being in appellant's store on the day of the robbery or prior to it. (T. 463). He also denied meeting Fennell in the store or any activity related to selling a coffeepot on the day of the robbery (T. 464-465, 491). He did admit, however, to being a heroin addict with a $70 to $80 a day habit and to convictions for "till tapping", purse stealing and shoplifting (T. 464, 483-491).

Peterson at first claimed that he met Fennell, the morning of the robbery at the corner of 150th Street and 107th Avenue (T. 465). Fennell was just standing there for about three or four minutes (T. 466). According to Peterson, the getaway car was also waiting at this location. As Peterson came up, he also saw Coates who told him to "come on." (T. 470-471). Peterson got into the car and went to rob the bank (T. 471). Upon cross-examination however, Peterson's version of these facts changed somewhat. At that time, he stated that he first met Coates a few blocks from 150th Street and Fennell

appeared at the same location * five minutes later (T. 477-478, 480). The car was not on 150th Street but was a couple of blocks away (T. 480).

Peterson also stated that he had been in Staley's store sometimes twice a week before the robbery in order to buy cigarettes and soda. He denied socializing at the store, using drugs in the store or seeing anyone else receive drugs in the store, claiming that it was "a place of business" and "not a pool room" (T. 493-494). He also stated that twenty minutes before he met Coates on the day of the robbery, he had a heroin "fix" of two $10 bags (T. 498-500) and had another "fix" right after he left the store after the robbery (T. 501).

Daniel Staley testified on his own behalf. (T. 506). He generally denied having any meetings with the co-defendants for the purposes of bank robberies, giving them any instructions, providing them with guns and receiving any bank robbery proceeds. (T. 511-512) He had known Coates and Bastian for about a year and a half (T. 510, 512) and met Derrick at his store on one occasion when Coates introduced him as a member of the "Seven Crowns" (T. 516-519). He never met Peterson or Fennell before his incarceration on this charge and has never heard or seen Arthur Mitchell in his life (519-526). Appellant further stated that when he first met Fennell in jail, Fennell stated that the government wanted him to testify against appellant, and added: "how can I testify against you if I don't even know you?" (T. 529). He denied ever instructing Fennell in prison to call his lawyer to tell the lawyer that he never met appellant before his incarceration (T. 543). Appellant also admitted to being interviewed by the F.B.I. on March 29, 1974, but denied

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* We note that this meeting place was about a block and a half from appellant's store (T. 478).

that he told them that he was an associate of Mitchell, Fennell or Peterson (T. 538). He further denied meeting Fennell at any apartment off South Road stating that his girlfriend lived on Glassboro and Liverpool Streets. (T. 509). On cross-examination, however, appellant admitted that he had a girlfriend named "Tina" or Ernestein in August of 1973 but had never seen her at 145-40 South Road, Jamaica (T. 542). He further stated that in December, 1973 or January 1974 he had truthfully reported his car as stolen and that the car was discovered about one month later (T. 544-545). He also stated that he had pleaded guilty to a gun violation and was on three years probation (T. 547).

C. The Rebuttal

In the rebuttal case the government called F.B.I. Agent Danny Coulson who testified that when he interviewed appellant on March 29, 1974, the appellant identified, from the bank surveillance photographs, Fennell, Peterson and Coates as people with whom he had associated. In fact, appellant was the first to provide the F.B.I. with Jimmy Fennell's name in their investigation (T. 549-551).

Jimmy Fennell also testified in rebuttal that "Tina" used to live with Fennell's paramour "Jerry" at 145-50 South Road, Jamaica from the end of 1972 until the beginning of 1973 and it was at this location that he first met Staley (T. 567-569). Fennell also testified that while he was incarcerated, Staley gave to him his lawyer's business card and told Fennell to call the lawyer and tell him that he, Fennell, had not even known Staley (T. 569-572). Fennell also stated that in December of 1973, appellant had told him that he had reported his car stolen because someone observed his license plate number when his car was parked in front of the bank during a robbery in Kew Gardens. Staley said that he had left his car

on the street and was driving a rented automobile (T. 571-572).

D. The Surrebuttal

Staley took the stand at surrebuttal to deny portions of his statement to the F.B.I. on March 29, 1974 about his association with Fennell and Peterson (T. 574).

Staley was found guilty on all charges on July 25, 1974.

The motion for a new trial

On October 4, 1974 appellant brought a motion for a new trial due to the newly discovered evidence and the exculpatory testimony of Leroy Jones.*

Leroy Jones, a juvenile and associate of the appellant ** surrendered voluntarily to authorities in Aiken, South Carolina on August 8, 1974 stating that he was wanted for a bank robbery in New York. The police department and F.B.I. in Aiken verified that a warrant had been issued for Jones for the robbery of the National

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* The Court consolidated into one hearing Staley's motion and Leroy Jones' hearing for an adjudication of delinquency under Title 18, U.S.C. § 5034. After the Court denied Staley's motion (H. 92), the Court found Leroy Jones to be a juvenile delinquent and sentenced him to the custody of the Attorney General until his majority (H. 108).

** Jones at the hearing stated that he was employed by Staley in his store from November 18, 1973 through January 8, 1974. He claimed that he met Staley when Staley was a tenant of his godfather, Clinton Graam (H. 6, 9). He had previously told F.B.I. Agents Grooms and Coulson that appellant was his uncle (H. 53, 81).

Bank of North America at 151-16 84th Street, Queens, New York occurring on January 8, 1974 (H. 47-48).*

A. Jones' statements of August 8, 1974 to the F.B.I.

Agents Clarence Grooms and James F. Pollattie of the F.B.I. in Aiken interviewed Leroy Jones after his arraignment and proper warnings (H. 48-51). Jones told the agents he had lived with and worked for Daniel Staley in New York. On January 8, 1974, Staley asked him if he would participate in a bank robbery with three others, Thedrow Jones also known as "Eggie" (H. 53),** Thomas Parker and Larry Derrick (H. 53). Leroy Jones agreed and left for the bank from appellant's store using three vehicles. Appellant led the way in his Ford LTD. He was followed by Leroy Jones who drove a stolen Buick Electra and Parker who was driving his own Nova (H. 55). Parker had previously cased the bank and confirmed that it was suitable to rob (H. 55). At the bank Derrick, Thedrow Jones and Leroy Jones entered and announced the holdup. Leroy Jones handed to a teller a pillowcase he had previously received from appellant at the store, and ordered her to fill it up with money (H. 56). Thedrow Jones stood guard at the door, while Derrick guarded the executive area in the bank. After they left the bank, Leroy Jones drove all three of them in the stolen Buick

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* An arrest warrant was issued for Leroy Jones on July 9, 1974 by U.S. Magistrate Vincent Catoggio in the Eastern District of New York based upon a complaint filed by Agent Coulson giving Derrick's statement implicating Leroy Jones, Fritz Bastian and "another" unknown individual.

** An arrest warrant for Thedrow Jones and Thomas Parker was issued by U.S. Magistrate Catoggio on August 13, 1974 based upon a complaint filed by F.B.I. Agent Robert McCartin giving the statements made by Leroy Jones which implicated these two men. See n. * at 21, *infra*.

Thedrow Jones and Leroy Jones were not in any way related.

four blocks where they switched into the Ford driven by Staley (H. 56-57). They all returned to an apartment of appellant's across the street from the store where Staley was waiting. They counted the money and divided it with the three participants of the actual robbery and the appellant, each receiving equal shares of approximately $7000 each (H. 56-57). Leroy Jones told Agent Grooms that he used a .38 caliber automatic during the course of the robbery which was owned and had been given to him by the appellant (H. 58). He also stated that the .32 caliber automatic used by Thedrow Jones belonged to Derrick who himself carried a .32 automatic (H. 48). Leroy Jones stated that Fritz Bastian did not participate in this robbery (H. 59). While Jones was still in the F.B.I. office, Agent Grooms telephoned Agent Danny Coulson of the F.B.I. in New York. Agent Coulson knew of the January 8, 1974 robbery and of the participation by one named "Eggie" whom he had not as yet identified. Both Agents, Grooms and Coulson, asked for "Eggie's" true name and for the first time learned from Leroy Jones "Eggie's" true name was Thedrow Jones (H. 60, 73-76, 79-82).

B. The Jones' affidavit

Leroy Jones arrived at the Federal House of Detention on West Street, New York on August 31, 1974 where Staley was also incarcerated (H. 23). He prepared and signed an affidavit (dated September 4, 1974), which exculpated the appellant and later became the basis of appellant's motion for a new trial.* The affidavit alleged that Leroy Jones had voluntarily surrendered "because there was an innocent man in jail."

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* Leroy Jones testified that the affidavit was prepared by himself and "Al", an inmate "lawyer" (H. 23-24). He denied that appellant asked him to prepare this (H. 24-26). Jones did have some difficulty in understanding part of his own affidavit when he was cross-examined (H. 26-27).

C. Jones' testimony at the hearing

At the hearing on this motion, which was held on October 4, 1974, Jones testified that a few days prior to December 12, 1973, he observed a meeting in the back room of appellant's store. Derrick, Coates, Bastian and another named "Tex"*** attended without appellant being present (H. 10). Derrick was supposedly employed at the store (H. 9-10).** Jones saw them leave and return shortly with "Tex" who proposed to call the police and report a robbery at McDonalds as a subterfuge to a robbery elsewhere they were to commit (T. 11). They allegedly returned that day to the store with a "whole lot of money" (H. 12). At no time was appellant present during these meetings in the back of the store (H. 12-13).

On or about December 18, 1973,*** Jones also noticed Coates, Peterson (a friend of Leroy Jones) and Fennell come into the store, "rapping" about a bank robbery

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* After the name of "Tex" had been mentioned at trial (T. 310-311) the F.B.I. were immediately sent to produce him in court as a possible rebuttal witness. ("Tex" had been previously identified as Fritz Bastian's cousin whose true name was Dallas McGirt.) After this witness was brought to the United States Attorney's building, the government offered to allow Mr. Grossman, appellant's counsel, to interview him (T. 447-449). "Tex" was interviewed by Mr. Grossman but was never called.

Fritz Bastian testified at trial for neither side due to the fact that his attorney advised against his testifying when his appeal was pending (T. 307, 447). (See footnote at , *supra*).

** Neither Derrick, Fennell, Coates, Staley nor Peterson ever testified that Derrick had been employed in the delicatessen. Later, on cross-examination Jones stated that he was paid money for letting men use the back room (H. 41).

*** The Court found at one point in the hearing that Leroy Jones was merely "pickup up dates Mr. Grossman gave him" and there was no indication that he knew what dates he was talking about (H. 19).

(again in the absence of Staley).* They left and later returned where Jones admitted them to the store by means of the back entrance (H. 14-16). There, they counted the money and divided it (again in the absence of appellant) (H. 16). On or around January 3, 1974, Coates, Derrick and Fennell entered the store and again went into the back room (H. 20). At no time did Leroy Jones observe appellant hand a gun to anyone, asserting that he and appellant did not have a gun in the store (H. 22). Leroy Jones further testified that on or about January 8, 1974, Derrick entered appellant's store to ask him to rob the bank with him that day. Leroy Jones responded "I don't mind" and agreed to do so (H. 7). Derrick utilized in that robbery a Buick Electra and somehow either he or Derrick stole appellant's car (H. 7-8, 33).**

Upon cross-examination Leroy Jones asserted that he had been interviewed by F.B.I. agents in South Carolina at which time he told Agent Grooms that an innocent man was in jail to which Agent Grooms responded "Baloney" (H. 29-30). Jones generally denied all the statements later attested to by Agent Grooms (H. 30-33).

D. The decision of the District Court

In opposition to the motion, the Government offered the testimony of F.B.I. Agents Grooms and Coulson discussed above. The government also offered the testimony and

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* This testimony conflicts with Peterson's trial testimony that he met Coates and Fennell on the street and immediately went to the robbery (T. 465-466, 470-471).

** On direct Jones states Derrick stole appellant's car (H. 7-8), but on cross, that he, Jones, stole it after "someone" had made him a key to it (H. 33-35).

prior statement of Thedrow Jones,* which implicated appellant. The Court refused to hear it and found:

> I really put no credibility in Leroy Jones' testimony. This statement that he prepared after he had met Daniel Staley in jail, which is inconsistent with what he made to the FBI down in South Carolina, I don't think has sufficient weight to have any influence with the jury, and I'll certainly not justify reopening a case that has been actually tried.

Accordingly, Mr. Staley's motion was denied (H. 92).

ARGUMENT

POINT I

Appellant received a fair trial

Appellant argues that he was denied his Fifth Amendment right to a fair trial because of prejudicial questions asked or directly elicited by the government which, it is claimed, were posed solely to prove appellant's criminal character. It is further argued that the government's summation compounded this prejudice by improperly commenting on "appellant's depraved nature". (Brief for Appellant at 7.)

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* Thedrow Jones consented to be treated as a juvenile on September 27, 1974. He was to have his juvenile delinquency adjudication on the date of Staley's hearing on October 4, 1974. As it happened, T. Jones never appeared that day and he was finally adjudicated a juvenile delinquent under Title 18, U.S.C. § 5034 on January 3, 1975 and sentenced to the custody of the Attorney General until his majority.

Charges against Thomas Parker were dismissed on January 9, 1975 due to the fact that Leroy Jones was the only witness who mentioned him in the robberies and had committed perjury at this October 4, 1974 hearing.

Appellant specifically objects to two questions asked by the government on cross-examination of Horace Peterson:

> "Did you ever pop drugs in the store?"

and

> "You never saw anyone else receive drugs in the store?" (T. 494).

The answer to each question was "no." * Appellant argues that these questions were asked solely to infer misconduct on the part of the appellant to prove appellant's criminal character.

At the outset, it should be noted that unlike most of the cases cited by appellant,** these questions did not relate to prior similar acts of misconduct engaged in by the *appellant*, but merely to the full scope of the activities of Peterson and other addicts within Staley store.***

The reason that these questions were asked was not to prove a criminal character but (1) to ascertain Peterson's state of mind during the robbery and (2) to ascertain the relationship between appellant (an allegedly respectable businessman) and the young men, most of whom were addicts. Peterson's state of mind affected by his addiction

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* There was no objection brought by appellant until after these questions and answers had been given (T. 494).

** *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975); *United States* v. *Ring*, 513 F.2d 1001, 1004-1005 (6th Cir. 1975). These cases involved prior *similar* criminal acts of the *defendant* to prove motive, intent, identity, absence of mistake or a common plan.

*** Peterson had testified on direct that he and the other robbers had access to Staley's store after the robbery.

Coates (T. 263), Peterson (T. 464), Bastian and Mitchell were heroin addicts and Derrick used drugs (T. 224).

was relevant in assessing his credibility as to the incidents immediately prior to, during, and immediately after, the robbery. The question as to Peterson's use of drugs in appellant's store was a prelude to questions (later asked (T. 498-500)) as to the time and location of Peterson's heroin use prior to and after the robbery. Thus, Peterson testified later that about twenty minutes before meeting Coates on the day of the robbery he had his "fix" (T. 498-500) and that he again took drugs immediately after his departure from appellant's store after the robbery (T. 500-501). He denied taking any drugs in the store, however (T. 494).

A further and even more important reason for this question was to establish the relationship between appellant and the robbers, all young men, most of whom were heroin addicts. Rather than being a respectable businessman victimized by the government's witnesses, this question was designed to establish the fact that Staley allowed his store to be a meeting ground for addicts to insure a ready supply of highly-motivated young men who were easily susceptible to appellant's lure of easy money. This relationship between Staley and addicts was also relevant for it tended to establish the need for a master planner, teacher and manipulative organizer of the robberies whose talents far exceeded those of the immature and often addicted robbers themselves.

It should also be noted that it was the government who first alerted defense counsel, during Fennell's cross-examination, that Staley's drug-related activities might be forthcoming when Fennell was asked by defense counsel "Do you have anything against Daniel Staley?" Despite the government's informing him that on a prior occasion Fennell had stated that one of his motives in cooperating with the government was his observation of Staley selling drugs to young people (T. 93-95), defense counsel per-

sisted in questioning along these lines.* Prior to Derrick's testimony, the government again cautioned appellant against asking broad questions that might elicit answers dealing with appellant's drug-related activities (T. 99-106).

Furthermore, assuming that these questions were improper, the error was harmless. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The answer to each question was "no" with Peterson asserting very strongly that the store was a "place of business" and "not a poolroom" (T. 493-494). Although this answer could have been rebutted, the government accepted this answer on face value to avoid any prejudice that would have resulted from such a rebuttal.** Thus, the unrebutted negative answer erased any possibility of prejudice that might have been inferred from the question.

Appellant also objects to a statement made by Fennell on his direct examination by the government. When he was asked "What happened after you gave him [Staley] the money?", Fennell responded that he gave Staley the gun immediately after receiving his share of the bank

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* Although Coates mentioned that he was an addict on his direct examination (T. 263), the appellant's attorney repeatedly questioned Coates on the extent of his addiction (T. 318-319, 345, 362, 394, 399-401). He also questioned Fennell extensively on his marijuana arrests (T. 104-106) and inquired of Derrick's use of drugs (T. 224).

** Coates could have testified that he and Peterson each bought drugs from Staley at his store. Such an answer would be evidence of appellant's misconduct, however, and not the misconduct of merely Peterson and other addicts, which the question to Peterson inferred.

It could also be argued that appellant's motive in planning robberies was to obtain not only his share of the robbery proceeds, but also the other participants' money who would use the robbery proceeds to purchase drugs from appellant.

proceeds, adding that appellant's "own brother had told me that we were supposed to . . . have been robbed" (T. 57). Appellant never objected to this, but the Court interposed and instructed Fennell that he could not talk about anyone else's conversation (T. 57). This statement was never asked or solicited by the government. Defense counsel, Meyer Grossman, did pry further into this area, however, on Fennell's cross-examination. When asked the question as to why Fennell did not like the way appellant treated people, Fennell explained that he was told that Staley had originally planned to steal from the actual robbers after the money was counted (T. 95). The answer was rephrased by appellant's counsel and asked again, to which Fennell replied that Coates and Staley's brother had told him about this (T. 95). Thus, the government never elicited this evidence of a proposed crime in the first instance and the appellant fully explored on cross-examination the incident that Fennell had merely referred to on direct to prove a motive to lie.

Thus, the question asked of Peterson and the unsolicited statement of Fennell did not deprive appellant of a fair trial.

Nor was the government's summation improper. In his summation, Mr. Grossman called the government's witnesses (and Peterson) "dope fiends" on many occasions (T. 585, 589, 593, 595, 599). In response to this characterization by appellant, the government merely responded that the government had to use "dope fiends" as witnesses because appellant was clever enough to manipulate them to rob the bank for him while he avoided going near the bank. It was further argued that appellant's crime involved placing guns with and schooling such addicts in bank robberies. Certainly the government's use of the words "dope fiends" was fair comment on the arguments made by defense counsel. *United States* v. *Wolfish*,

Slip Op. 1167, at 5638 (2d Cir. August 14, 1975); *United States* v. *Wilner*, Slip Op. 561, at 6117-6118 (2d Cir. September 10, 1975); *United States* v. *DeAngelis*, 490 F.2d 1004, 1010-1012 (2d Cir. 1974) (Mansfield, *C.J.*, concurring).

Equally meritless is appellant's objection to the government's summation in allegedly vouching for the credibility of its witnesses. In the same sentence, the government immediately corrected itself by stating:

> It is our conclusion, ladies and gentlemen, [. . .] the evidence in this case rather [that] Mr. Staley was an aider and abettor in this crime." (T. 641).

Despite Mr. Grossman's numerous objections to the government's summation (T. 604, 611, 612, 614, 617, 626, 630, 633, 635, 636, 637-638, 639), he never objected to this statement, nor asked the Court for any further limiting instructions. This failure to comment indicates counsel's own difficulty in finding prejudice, does not constitute plain error and should thus preclude this Court from considering this issue on appeal. *See United States* v. *Canniff*, Slip Op. 1142 (2d Cir., August 13, 1975).

In addition, the excesses of defense counsel on his own summation should find little judicial sympathy. *United States* v. *Canniff*, *supra* at 5618; *United States* v. *De Angelis*, *supra*, 490 F.2d at 1010-1012. Defense counsel himself ceremoniously stated: "Staley is innocent. That is my opinion". (T. 599). He also repeatedly made references to personal experiences that were never attested to and while he was repeatedly admonished by the Court, he persisted in his improper statements. For instance, to corroborate Staley's testimony, he informed the jury in summation that he told Staley to give out his business cards to have other inmates call him (T. 585). Even after

the Court cautioned him against testifying, Mr. Grossman went on to state that Fennell called him on May 29, 1974 (which contradicted Fennell's testimony) (T. 586). Even after the Court's cautioning him again, counsel stated "He [Fennell] denied calling him [sic]. I don't know why. All I wanted was to interrogate him about this, all right?" (T. 587). Counsel later commented upon the government's cross-examination of appellant and stated his personal opinion: "I don't think he fell apart there". (T. 594). He further stated that he had tried to get many others to testify: "There were six or seven people. Some people I couldn't get. I tried. I went down to various neighborhoods . . ." (Tr. 595). When the Court again cautioned defense counsel, he merely continued: "I just want you to picture where this thing happened, and think why I couldn't get the others. Arthur Mitchell I couldn't find". (T. 595-596). After objection, counsel still persisted "I just want the truth to come out." (T. 596).

After a summation rife with unsworn testimony and personal opinion, it is ludicrous that appellant now charges that the government's summation was inflammatory and improper.

In short, neither the questions asked by the government nor its summation in any way amounted to the reprehensible activities in *Berger* v. *United States*, 295 U.S. 78 (1935) and appellant was not denied a fair trial.

POINT II

The District Court properly denied appellant's motion for a new trial.

Appellant further seeks to reverse the United States District Court's order which denied appellant's motion for a new trial based upon the newly discovered evidence of Leroy Jones.

It should be noted at the outset that unlike many cases * cited by appellant, the nature of the newly discovered evidence was not impeaching material on government witnesses intentionally or inadvertently withheld by the government, but rather a new defense witness who had previously been a fugitive whose whereabouts were unknown to the government. In general, motions for a new trial are not held in great favor. *United States* v. *Slutsky*, 519 F.2d 1222, 1225 (2d Cir. 1975); *United States* v. *Catalano*, 491 F.2d 268, 274 (2d Cir.), *cert. denied*, 95 S. Ct. 42 (1974). In determining if a motion for a new trial should be granted, the district court should determine: (1) if the evidence could not with due diligence have been discovered after the trial; (2) if the evidence is material to the factual issues at trial and not merely cumulative and (3) if the evidence, developed by a skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. *United States* v. *Slutsky*, *supra*, 519 at 1225; *United States* v. *Rosner*, 516 F.2d 269, 273 (2d Cir. 1975); *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir.), *cert. denied*, 417 U.S. 919 (1973).

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* *United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975); *United States* v. *Morell*, Slip Op. 1217 (2d Cir., August 29, 1975); *United States* v. *Anderson*, 509 F.2d 312 (D.C. Cir. 1974).

Here, there has been no showing that Staley exercised due diligence in securing his fugitive nephew's testimony at trial. In addition, Jones' testimony of a general exoneration of appellant was cumulative in some respects to the general exoneration by Peterson at trial. Assuming *arguendo* that appellant meets these first two requirements of recent discovery and materiality, however, he has utterly failed to show that Jones' testimony would have induced in any juror's mind a reasonable doubt.

Rather than adding to the defense of the appellant, the testimony of Jones at the hearing could very well have aided the government in establishing the extent of association between the robbers and appellant. While Peterson testified that he went to Staley's store merely as a customer and returned to his store after the robbery, Jones testified that Peterson was in appellant's store prior to the robbery "rapping" about the robbery. While Staley testified that he had never met Peterson prior to his incarceration, Jones testified that he, Jones, had been an associate of Peterson. Since Jones worked six days a week at Staley's store, it would be reasonable to conclude that Staley would at least have knowledge of Jones' associates. Equally so, Jones' testimony as to Staley's hiring of Derrick would serve to damage Staley's testimony at trial that he had been merely introduced to Derrick by Coates as a "Seven Crowns gangster" and would blunt his counsel's argument that Staley had been victimized by such "gangsters". In addition, the statements made by Jones to the FBI in Aiken and telephonically to Agent Coulson in New York could further strengthen the government's case due to their similarity in many details with

that of the testimony of Derrick.* Indeed, these statements also formed the basis of the complaints and arrest warrants for Thedrow Jones and Thomas Parker.

In short, the Court's finding of Jones' testimony as incredible was solidly based upon the Court's presence not only at the hearing but also at appellant's trial where it had the opportunity to assess the credibility and influence of all witnesses. Accordingly, this Court should not review the District Court's factual findings based upon the evidence and should uphold the denial of the motion for a new trial. *See, United States* v. *Johnson*, 327 U.S. 106, 111 (1946); *United States* v. *Pfingst, supra*, 490 F.2d at 273 n. 11.

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* Leroy Jones' initial statement was in accord with Derrick's testimony at trial that a "Roy" and "Eggie" were involved in the robbery and that appellant's car was a "switch car" and that after the robbery appellant received a share of the proceeds. The statements differ to the extent that Derrick placed Fritz Bastian in the bank while Jones denied that Bastian played any part in the robbery. Derrick also stated that Roy remained in the car as the driver, while Jones placed himself in the bank. Derrick stated that all the guns were appellant's, while Jones indicated that two belonged to Derrick.

CONCLUSION

The judgment of conviction should be affirmed. The District Court's denial of appellant's motion for a new trial should be affirmed.

Dated: October 15, 1975

Respectfully submitted,

DAVID G. TRAGER,
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PAUL B. BERGMAN,
JOAN S. O'BRIEN,
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Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 15th day of October, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Meyer Grossman, Esq.
Grossman, Neidorff, Ribaudo & Weinbaum
26 Court Street
Brooklyn, N.Y. 11242

Evelyn Cohen

Sworn to before me this
15th day of Oct. 1975

ROSA S. MORGAN
Notary Public, State of New York
No. 24-4501965
Qualified in Kings County
Commission Expires March 30, 1977